IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
MAY 2000 SESSION

IN RE: ADOPTION OF J.D.W.

Appeal from the Chancery Court for Cheatham County
No. 9800 Allen W. Wallace, Chancellor

No. M2000-00151-COA-R3-CV - August 16, 2000

This case involves a father's objection to the trial court's order terminating his parental rights pursuant to Tenn. Code Ann. § 36-1-102(1)(A)(i), finding that the father had abandoned the boy and that the termination of the father's parental rights was in the boy's best interest. The father was not represented by counsel at trial, and no transcript was made of the proceedings. The father appeals, claiming that the evidence does not support the trial court's finding of abandonment and that his rights to due process were violated by his lack of representation. The lack of a transcript prevents us from determining whether sufficient evidence supported the termination and denies the father proper appellate consideration of his claims. We therefore vacate the judgment of the trial court and remand the case for proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated and Remanded

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S, and WILLIAM C. KOCH, JR., J., joined.

Ronald K. West, Nashville, Tennessee, Pro Se.

Hubert D. Patty, Maryville, Tennessee, for the appellee, Anthony Blaine Mayberry.

OPINION

The child who is the subject of this action, J.D.W, a boy, was born December 30, 1986. His parents divorced in 1990, and the mother remarried in 1991. The father moved to California after the divorce. In 1997, a Davidson County court set visitation and telephone visits between the father and son at the father's request. The father called the son for a while, but the calls became less and less frequent.

In 1998, the mother and stepfather initiated these proceedings to terminate the father's

parental rights and for the stepfather to adopt the boy, based on the father's failure to visit or support the child. The father answered, denying that the termination was in the best interest of the boy, and claiming that the failure to visit or support the boy was not "willful" because he lived so far away and had no income other than his Social Security disability payments. The father claimed in his answer that he made few telephone calls because his son became hostile and refused to speak to him.

A hearing was held in April 1999 in which the father represented himself. Apparently no court reporter was present. The trial court granted the termination of the father's parental rights and the stepfather's adoption. The father filed two motions for a new trial, the second of which was accompanied by a motion for the court to appoint counsel to represent him. All of the father's motions regarding a new trial were denied.

No verbatim record was made of the April 1999 hearing, nor any other hearing in this matter. The father attempted to prepare a Statement of the Evidence of the April hearing for submission to this court, as required by Tenn. R. App. P. 24(c), but his statement was unacceptable to the trial court. The trial court ordered the father to "file a correct Statement of the Evidence within ten (10) days from December 6, 1999. In the event said statement is not properly filed as directed the Statement of the Evidence shall [be] the Memorandum Opinion of the Court on record in this case." The revised statement was apparently also unacceptable to the court, and the trial court ordered that findings of fact in the Memorandum Opinion become the Statement of the Evidence.

The trial court's findings of fact in its Memorandum Opinion were as follows:

> The biological father and mother of the child were divorced on July 6, 1990. By January 1997, when respondent filed a petition in Davidson County to reduce his arrearage and support and for visitation privileges, he was sixteen thousand dollars ($16,000.00) in arrears.
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> On February 18, 1997, his arrearage was reduced to three thousand, nine hundred ninety five dollars ($3,995.00) and support was reduced from fifty dollars ($50.00) per week to one hundred fifteen dollars ($115.00) per month. He was also granted certain visitation rights and could call the child at specific times. In 1997, he should have called the child forty five (45) times and he called seventeen (17) times. In 1998, he should have called the child fifty three (53) times and he called the child eleven (11) times.
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> He never paid support as ordered in May 1997 until August 3, 1997 he made seven (7) child support payments which totaled one hundred thirty three dollars and eighty five cents ($133.85). For a period from August 15, 1997 until April 20, 1998, he paid a total amount of child support of one dollar and six cents ($1.06).
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> During the period of four (4) months next preceding the filing of this petition, he

made no support payments and made one (1) phone call on October 1, 1998.

> He contends he has not willfuly [sic] refused to pay child support because he is disabled and only drew Social Security Insurance benefits of six hundred fifty two dollars ($652.00) per month. He further testified he is a musician and did do some studio work as a favor to his friends, but received no money for his work. He submitted certain medical reports which the Court considered, but the Court is of the opinion his explanation of his disability was more severe than indicated by his medical reports.
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> He explained he did not call as ordered by the Davidson County Court because he felt it not in the best interest of the child.
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> Respondent has since the parties divorced engaged in mere perfunctory and token visitation and support. During four (4) months preceding the filing of this complaint, he made one (1) phone call and no support. [sic]

The court then concluded that the evidence was clear and convincing that the father abandoned the child and that termination was in the best interest of the child.

The father appeals, claiming that the evidence did not show that his lack of visitation and support was "willful" and that due process required that he should have had appointed counsel to represent him at the hearing.

I. The Interests at Stake

The United States Supreme Court has recognized the unique nature of proceedings to terminate parental rights, stating that "[f]ew consequences of judicial action are so grave as the severance of natural family ties." *M.L.B. v. S.L.J.*, 519 U.S. 102, 119, 117 S. Ct. 555, 565, 136 L. Ed. 2d 473, 489 (1996) (quoting *Santosky v. Kramer*, 455 U.S. 745, 787, 102 S. Ct. 1388, 1412, 71 L. Ed. 2d 599, 628 (1982) (Rehnquist, J., dissenting)). As a result, "[T]he interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." *Id.* The constitutional protections of the parent-child relationship require certain safeguards before the relationship can be severed. *See O'Daniel v. Messier*, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995).

Among those safeguards is the requirement that courts apply a heightened standard of proof, the "clear and convincing" proof standard. *See Santosky*, 455 U.S. at 769, 102 S.Ct. at 1403, 71 L.Ed. 2d at 617; *O'Daniel*, 905 S.W.2d at 186. To justify the termination of parental rights, the grounds for termination must be established by clear and convincing evidence. *See* Tenn. Code. Ann. § 36-1-113(c)(1) (Supp. 1999); *State Dep't of Human Servs. v. Defriece*, 937 S.W.2d 954, 960 (Tenn. Ct. App. 1996). Evidence which satisfies the clear and convincing standard "eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence." *O'Daniel*, 905 S.W.2d at 188. "This heightened standard . . . serves to prevent the

unwarranted termination or interference with the biological parents' rights to their children." *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998).

Under this heightened standard of proof, an appellate court must first review the trial court's findings in accordance with Tenn. R. App. P. 13(d). That review is *de novo*, with a presumption of correctness for the trial court's findings of fact, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d). Then, we must determine whether the facts make out a clear and convincing case in favor of terminating the parents' parental rights. *See In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988).

II. Lack of a Transcript

Father herein asserts that the evidence was not sufficient to support a finding of willful abandonment,[1] essentially an argument that the evidence preponderates against the trial court's findings, including its finding that the mother and stepfather had presented clear and convincing evidence of abandonment. The trial court herein adopted its findings of fact in the Memorandum Opinion as the Statement of the Evidence. No transcript or other substantially complete record was made of the proceedings below or provided to us. The lack of such a record prevents our review of the evidence to determine whether it supports or preponderates against the trial court's findings and prevents our application of the clear and convincing evidence standard. While in other types of civil cases we would be required to conduct our review using the Statement of the Evidence, *see* Tenn. R. App. P. 24(c), or to accept as conclusive the trial court's findings, *see King v. King*, 986 S.W.2d 216, 220 (Tenn. Ct. App. 1998), such procedures do not satisfy the constitutional requirements applicable to an appeal from an order terminating parental rights.

In *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996), the U.S. Supreme Court held that a parent's interest in defending against a state's action in terminating parental rights required a record complete enough to allow fair appellate consideration of the parent's claims. *See M.L.B.*, 519 U.S. at 121-22, 117 S. Ct. at 566, 136 L. Ed. 2d at 491. Relying on previous rulings regarding due process and equal protection,[2] the Court in *M.L.B.* held, "we place decrees

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[1] *See In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999).

[2] Specifically, the Court relied upon *Griffin v. Illinois*, 351 U.S. 12, 18-19, 76 S. Ct. 585, 590-91, 100 L. Ed. 891, 899 (1956) (recognizing "the importance of appellate review to a correct adjudication of guilt or innocence" and holding that appellate review, including transcripts needed to pursue appeals, cannot be denied indigent defendants where it is available to more affluent persons), *Mayer v. Chicago*, 404 U.S. 189, 196-98, 92 S. Ct. 410, 415-16, 30 L. Ed. 2d 372, 379-80 (1971) (declining to limit *Griffin* to cases where the defendant faced incarceration, holding an indigent defendant found guilty of conduct only "quasi criminal in nature . . . cannot be denied a record of sufficient completeness to permit proper [appellate] consideration of his claims"), *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27, 101 S. Ct. 2153, 2160, 68 L. Ed. 2d 640, 650 (1981) (recognizing that the object of termination proceedings is not simply to infringe upon the parent's interest, but to end it, thus "working a unique kind of deprivation," and holding that a case-by-case determination of the need for appointed counsel for an indigent parent facing termination of parental rights was required), and *Santosky*, 455 U.S. at 758-59, 102 S. Ct. at 1397, 71 L. Ed. 2d at 610 (a parent's interest is "far more precious than any property right," and the "clear and convincing" proof standard is constitutionally required in proceedings to terminate that interest).

forever terminating parental rights in the category of cases in which the state may not 'bolt the door to equal justice.'" *M.L.B.*, 519 U.S. at 124, 117 S. Ct. at 568, 136 L. Ed. 2d at 493. The Court ruled that the State could not withhold from an indigent parent seeking review of a termination of parental rights "a 'record of sufficient completeness' to permit proper [appellate] consideration of [her] claims." *M.L.B.*, 519 U.S. at 128, 117 S. Ct. at 570, 136 L. Ed. 2d at 495.

The Court noted that the trial judge in *M.L.B.* had simply recited the statutory language, and that his order "describes no evidence, and otherwise details no reasons for finding M.L.B. 'clear[ly] and convincing[ly]' unfit to be a parent." *M.L.B.*, 519 U.S. at 121, 117 S. Ct. at 566, 136 L. Ed. 2d at 491. The Court then stated, "Only a transcript[3] can reveal to judicial minds other than the Chancellor's the sufficiency, or insufficiency, of the evidence to support his stern judgment." *M.L.B.*, 519 U.S. at 121-22, 117 S. Ct. at 566, 136 L. Ed. 2d at 491. While the trial court in the case before us made findings of fact and did not merely recite conclusions in statutory language, we think that distinction does not alter the effect of the lack of a complete record of the events at trial on our ability to provide the type of complete appellate review required in termination of parental rights cases. Without a complete record of the evidence below, we are unable to conduct the type of review required in termination cases. "A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one. Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision." *Lassiter*, 452 U.S. at 27, 101 S. Ct. at 2160, 68 L. Ed.2d at 650. Full appellate consideration of a trial court's determination to terminate a parent's rights is part of the process designed to achieve an accurate and just decision and, therefore, cannot be denied to a parent because of his or her financial inability to produce a record for such review.[4]

Thus, we hold that, in cases involving the termination of parental rights, a record of the proceeding of sufficient completeness to permit proper appellate consideration of the parent's claims must be made in order to preserve that parent's right to an effective appeal. If the parent whose rights are to be terminated is indigent, then the trial court must ensure that such a record is created

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[3]Although the Court used the word "transcript" in its opinion, it also used the phrase "record of sufficient completeness." *See M.L.B.*, 519 U.S. at 128, 117 S. Ct. at 570, 136 L. Ed. 2d at 495 (citing *Mayer*, 404 U.S. at 198, 92 S. Ct. at 416, 30 L. Ed. 2d at 380). In a footnote the Court indicated that a full verbatim transcript may not be required. *See M.L.B.*, 519 U.S. at 112, 117 S. Ct. at 561, 136 L. Ed. 2d at 485 n.5 (quoting *Draper v. Washington*, 372 U.S. 487, 495, 83 S. Ct. 774, 779, 9 L. Ed. 2d 899, 905 (1963) ("Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise."); *Mayer v. Chicago*, 404 U.S. at 194, 92 S. Ct. at 414-15, 30 L. Ed. 2d at 378 ("A record of sufficient completeness does not translate automatically into a complete verbatim transcript.")). Because the case before us contains neither a transcript nor any attempt at a complete record of the evidence or events at trial, we need not determine what a "record of sufficient completeness for appellate review" needs to contain. We simply note that we are unable to review the sufficiency of the evidence in the case before us.

[4]We recognize some distinction between *M.L.B.* and the case before us. In *M.L.B.*, the trial proceedings had been transcribed, but the mother was denied a transcript because of her inability to prepay the cost of producing it. Here, there is no indication that the trial was recorded. However, the primary teachings of *M.L.B.* are that effective appeal cannot be denied a parent because of his or her poverty and that a record of sufficient completeness is necessary for effective appellate review. Those principles are the basis of our ruling herein.

and made available to a parent who seeks to appeal.[5] Because the trial record does not constitute a record of sufficient completeness for appellate review, we vacate the orders terminating the father's parental rights and granting the subsequent adoption and remand this case to the trial court for a new trial on this matter. The trial court shall determine the father's indigency, and if the father is indigent, the trial court shall ensure the availability of a record of trial evidence and events which is sufficiently complete to allow an appellate court to review the evidence in accordance with applicable standards.

IV. Lack of Counsel

In *Lassiter v. Department of Social Services*, the U.S. Supreme Court considered whether the due process clause required the appointment of counsel for an indigent parent facing termination of his or her parental rights. Applying a "fundamental fairness test," the Court determined that in each case three elements must be evaluated to determine the answer: the private interests at stake, the government's interest, and the risk that the procedures will lead to erroneous decisions. *Lassiter*, 452 U.S. at 27, 101 S. Ct. at 2159, 68 L. Ed. 2d at 649 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18, 33 (1976)).

> To summarize the above discussion of the *Eldridge* factors: the parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.
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> If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel. But since the *Eldridge* factors will not always be so distributed, and since "due process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed," neither can we say that the Constitution requires the appointment of counsel in every parental termination

[5]Even in a case such as the one before us involving a termination petition brought by private parties, the state is required to provide a record because state action is invoked by asking a court to end a parental relationship. In *M.L.B.*, the Supreme Court noted, "Although the termination proceeding in this case was initiated by private parties as a prelude to an adoption petition, rather than by a state agency, the challenged state action remains essentially the same: M.L.B. resists the imposition of an official decree extinguishing, as no power other than the State can, her parent-child relationships." *M.L.B.*, 519 U.S. at 116, 117 S. Ct. at 564, 136 L. Ed. 2d at 488 n.8.

proceeding.

Lassiter, 452 U.S. at 31, 101 S. Ct. at 2161-62, 68 L. Ed. 2d at 652 (citations omitted).

Recognizing that facts and circumstances of termination of parental rights cases vary greatly, the Court determined that the right to appointed counsel must be made on a case by case basis. *See id.* Our court has determined that the main consideration in determining whether counsel must be appointed is the chance that the failure to appoint counsel will result in an erroneous decision. *See State ex rel. T.H. v. Min*, 802 S.W.2d 625, 626-27 (Tenn. Ct. App. 1990).

> To help assess the risk of an unfair proceeding resulting in an erroneous decision, the courts in *Lassiter* and *Davis* have listed several factors that bear on the question. They include: (1) whether expert medical and/or psychiatric testimony is presented at the hearing; (2) whether the parents have had uncommon difficulty in dealing with life and life situations; (3) whether the parents are thrust into a distressing and disorienting situation at the hearing; (4) the difficulty and complexity of the issues and procedures; (5) the possibility of criminal self-incrimination; (6) the educational background of the parents; and (7) the permanency of potential deprivation of the child in question.

Id., 802 S.W.2d at 627 (citing *Lassiter*, 452 U.S. at 30, 101 S. Ct. at 2161-63, 68 L. Ed. 2d at 651-52; *Davis v. Page*, 714 F.2d 512, 516-17 (5th Cir. 1983)). While not specifically listed among the factors above, the Court in *Lassiter* also considered the parent's efforts to avoid or oppose the termination of parental rights. *See Lassiter*, 452 U.S. at 33, 101 S. Ct. at 2163, 68 L. Ed. 2d at 653 (noting that the mother had declined to appear at an earlier custody proceeding and had failed to mention the termination proceedings to the attorney representing her in a criminal matter).

In a number of cases, Tennessee appellate courts have reviewed the termination of parental rights when the parent was unrepresented at the hearing on a case by case basis, as required by *Lassiter*. *See, e.g.*, *T.H.*, 802 S.W.2d at 627 (requiring a rehearing on removal of custody of children from parents after noting that medical and hearsay evidence was presented at trial); *State Dep't of Human Servs. v. Taylor*, No. 03A01-9609-JV-00286, 1997 WL 122242 at *2 (Tenn. Ct. App. Mar. 19, 1997) (no Tenn. R. App. P. 11 application filed) (termination of parental rights reversed because trial court did not advise father of his right to counsel, did not make inquiry about his indigency, and did not show consideration of *Lassiter* factors); *In re Adoption of Howson*, No. 03A01-9302-CV-0072, 1993 WL 258783 at *2 (Tenn. Ct. App. July 12, 1993) (no Tenn. R. App. P. 11 application filed) (termination of parental rights vacated because the court did not appoint counsel for an indigent mother facing medical testimony, who did not understand the rules of procedure, and whose dispute with the father involved three states), *but see In re Fillinger*, No. 02A01-9409-JV-00223, 1996 WL 271748 at *5 (Tenn. Ct. App. May 23, 1996) (no Tenn. R. App. P. 11 application filed) (in which parents who delayed an earlier hearing in order to obtain counsel, but did not do so, and then actively participated in the hearing were found to have no right to appointed counsel). In each of these cases, this court applied the *Lassiter* test using the transcript of the termination hearing.

In *State Dep't of Human Servs. v. Taylor*, 1997 WL 122242, this court stated:

> The transcript of the hearing reflects that the trial court failed to advise the defendant at the beginning of the hearing that he was entitled to an attorney and further failed to make a preliminary finding of indigency or non-indigency. The record does not demonstrate the the court considered the facts enumerated in *Lassiter* or *Davis* to make a determination of whether this was a proper case for the appointment of an attorney. We find this to be reversible error.

Taylor, 1997 WL 122242 at *2. This holding rests in part upon the requirement in the Tennessee Rules of Juvenile Procedure, applicable to the trial court in *Taylor* but not to the trial court herein, that the court inform a defendant parent of the right to counsel and, if that parent is indigent, to consider the facts and circumstances and determine whether counsel should be appointed.[6] The *Taylor* court considered these rules to have been designed by the Tennessee Supreme Court and the General Assembly to ensure compliance with *Lassiter*. *Id.* Regardless of the applicability of the Rules, the holding thus additionally rests on the reasoned interpretation and application of *Lassiter*. *Id.*

Like the *Taylor* court, we read *Lassiter* as holding that, while constitutional due process may not require the appointment of counsel in every case, it does require the trial court to consider whether appointment of counsel is necessary in order to ensure fundamental fairness. The Supreme Court also held that the trial court's initial determination of whether due process requires the appointment of counsel for an indigent parent is "subject, of course, to appellate review." *Lassiter*, 452 U.S. at 33-34, 101 S. Ct. at 2163, 68 L. Ed. 2d at 653-54. Therefore, we are of the opinion that a record sufficient to allow appropriate appellate review of the determination on appointed counsel is also required.[7]

In the case before us, the record includes no transcript of the termination hearing, and the record does not indicate that the father requested that counsel be appointed for him until after hearing

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[6]Tenn. R. Juv. P. 39(f)(2) requires the court, at the beginning of the hearing, to inform an unrepresented parent in termination of parental rights cases of the "right to an attorney, and in the case of an indigent respondent, . . . [to] consider the facts and circumstances alleged and make a determination as to whether an attorney should be appointed." Tenn. R. Juv. P. 39(f)(2); *see also In re Valle*, No. W1998-00617-COA-R3-CV, 2000 WL 286710 at *6 (Tenn. Ct. App. Feb. 17, 2000) (Tenn. R. App. P. 11 application filed Apr. 20, 2000) (termination reversed because "the mandate of Rule 39 was not met"). Although Tenn. R. Juv. P. 39 applies only to juvenile courts, the parent's due process rights do not vary depending on the court hearing the termination.

[7]In the cases from this court cited earlier, the transcript of the termination hearing was deemed sufficient for review of the appointment of counsel issue. We are aware of *State Dep't of Human Servs. v. Harris*, No. 01A01-9203-CV-00109, 1992 WL 259288 (Tenn. Ct. App. Oct. 7, 1992) (perm. app. denied Dec. 21, 1992) in which this court held that the absence of a trial transcript precluded appellate evaluation of the factors set out in *Lassiter* and *T.H.*, stating that "absent a transcript or a statement of the evidence, this court must presume that there is sufficient evidence to support the trial court's decision denying the appointment of counsel on appeal." *Harris*, 1992 WL 259288 at *3. We note that *Harris* predated *M.L.B.*, wherein the U.S. Supreme Court stressed the necessity of an adequate record to the effective appeal of issues affecting constitutionally protected interests.

and judgment. However, a parent's failure to request a court appointed attorney prior to trial does not relieve the court of the obligations to inform the parent of his right to be represented and to determine whether due process requires the appointment of counsel where the parent is indigent.

Having considered our precedents and *Lassiter*, we reiterate that trial courts must determine whether an indigent parent is entitled to appointed counsel. The court must apply the *Lassiter* factors, as well as other appropriate factors, and determine whether "fundamental fairness" requires that the parent receive court appointed counsel. Because the record does not include a transcript or other record of the evidence and events at trial, we cannot determine whether the trial court even considered appointing counsel for the father. Further, we are unable to perform a *Lassiter* analysis on our own.

V.

We vacate the order terminating the father's parental rights, as well as the one granting the adoption, and remand this case to the trial court for proceedings consistent with this opinion. Costs are taxed against the Appellee for which execution may issue if necessary.

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PATRICIA J. COTTRELL, JUDGE